SHA'ARI A SAMAT v. PP

HIGH COURT MALAYA, JOHOR
COLLIN LAWRENCE SEQUERAH JC
[CRIMINAL APPEAL NO: 42S(A)-05-10-2015]
5 JANUARY 2017

CRIMINAL LAW: *Penal Code – Sections 354 & 377B – Using criminal force with intent to outrage modesty – Committing carnal intercourse against order of nature – Conviction and sentence – Appeal against – Prima facie case – Whether established – Whether court could re-evaluate evidence for prosecution notwithstanding that a prima facie case had been made out – Whether tantamount to 'three bites of the cherry' – Two tier hierarchy system and principle of stare decisis – Whether applicable*

CRIMINAL LAW: *Penal Code – Sections 354 & 377B – Using criminal force with intent to outrage modesty – Committing carnal intercourse against order of nature – Conviction and sentence – Appeal against – Whether Sessions Court Judge erred in assessment of defence – Whether defence failed to give credible evidence – Whether alibi supported by witnesses for defence – Whether there was sufficient evidence that accused committed alleged acts – Whether defence case succeeded in raising reasonable doubt*

CRIMINAL LAW: *Penal Code – Sections 354 & 377B – Using criminal force with intent to outrage modesty – Committing carnal intercourse against order of nature – Sentencing – Factors considered – Public interest – Whether sentence passed ought to act as deterrent to others – Whether there was flaw in sentences passed*

The appellant was charged under ss. 354 and 377B of the Penal Code for the offence of assaulting or using criminal force on a person with intent to outrage modesty and for committing carnal intercourse against the order of nature on the victim ('SP1') in a toilet at a secondary school. According to SP1, she was unable to escape or shout for help as she was being prevented from doing so by the appellant. SP1 said that she had been violated by the appellant for the last one and a half years previously. Communication through short messaging services ('SMSs') were discovered between the appellant and SP1 containing crude messages such as 'esok sayang hisap sampai habis.' Thus, SP2, the father of SP1, lodged a police report against the appellant and a medical check up on SP1 showed that there were hymen tears on SP1. The Sessions Court, however, ruled that the prosecution had failed to make out a *prima facie* case against the appellant and acquitted and discharged him. The High Court upheld the decision of the Sessions Court. The prosecution filed a further appeal to the Court of Appeal, which allowed the appeal by the prosecution and ruled that the prosecution had successfully made out a *prima facie* case against the appellant and ordered the case to be remitted back to the Sessions Court with an order that the defence of the appellant be called. The Sessions Court accordingly called for the defence of the appellant. The appellant elected to make a statement from the dock,

where he stated that SP1 was prone to making up stories and that she had made up this story against him. He denied the allegation and said that he was the victim of a frame up. The Sessions Court found that the appellant had failed to raise reasonable doubt and convicted him on both charges. The appellant was then sentenced to imprisonment of three years from the date of conviction for the first charge and seven years from date of conviction for the second charge. Both sentences were ordered to run concurrently. The appellant thus submitted that the Sessions Court Judge had failed to evaluate and consider that the evidence of SP1 was untrue, inconsistent and unsupported by independent corroboration. The issues that arose for determination were (i) whether this court could now re-evaluate the evidence for the prosecution notwithstanding that the Court of Appeal had ruled that there was a *prima facie* case made out; and (ii) whether the Sessions Court Judge had erred in law or fact in her assessment of the defence.

Held (dismissing appeal against conviction and sentence):

(1) The decision of the Sessions Court Judge that the prosecution had failed to make out a *prima facie* case for the prosecution was subject to appeal to the High Court who upheld the decision of the SCJ. The matter thereafter went on further appeal to the Court of Appeal. However, the Court of Appeal to the contrary decided that the prosecution had succeeded in making out a *prima facie* case and ordered that the defence of the appellant be called. That effectively concluded the two tier process in respect of the decision in respect of whether a *prima facie* case had been made out by the prosecution. To now allow the appellant to revisit the issue of whether a *prima facie* case had been made out would tantamount to 'three bites at the cherry'. The two tier hierarchy system and also the principle of *stare decisis* would militate against this. Thus, this court was bound by the decision and finding of the Court of Appeal that a *prima facie* case was made out by the prosecution. It could not re-visit the case for the prosecution. This court was therefore only confined to consider whether the defence case had succeeded in raising a reasonable doubt in the case for the prosecution. (paras 44 & 45)

(2) The SCJ had correctly observed that the weight to be accorded to an unsworn statement made from the dock must necessarily be entitled to less weight than that of evidence by way of sworn testimony. The SCJ was also correct in observing that the appellant had failed to give credible evidence and that the defence witnesses could not support the appellant's alibi that the appellant had been in the classroom that day and could not have been in the toilet with SP1. SP1 and SP2's evidence that the appellant had committed the acts complained of were therefore credible and demolished the claim of the appellant that they had conspired against him. The incorrect description of the defence of the appellant that he was impotent, as an afterthought, did not prejudice the case for the prosecution as there was sufficient evidence that the appellant had committed the offence. Even if the appellant was

impotent, this did not necessarily mean that he did not commit the offences for which he was charged with. There was sufficient evidence that the appellant had committed the offences he was charged for. The SCJ did not err in fact or in law in coming to her ultimate decision at the end of the whole case. (paras 49-57)

(3) Public interest was the first and foremost consideration. Not only must the sentence passed act as a lesson to the offender but also act as a deterrent to others in wanting to commit such offences. The SCJ had further correctly recognised the vulnerability of the victim who was a child with special needs and that the appellant had abused the trust and confidence reposed in him to care for the victim as custodian and not to take advantage of the situation. The SCJ had also alluded to the fact that the appellant had tainted the good name of the teaching profession by committing such an act. She had therefore taken into account all relevant considerations. There was no flaw in the sentences passed by the SCJ. (paras 58-60)

Case(s) referred to:
Masroni Ahmad Rafi v. PP [1996] 1 LNS 341 HC ***(refd)***
Periasamy Sinnapan v. PP [1996] 3 CLJ 187 CA ***(refd)***
P'ng Hun Sun v. Dato' Yip Yee Foo [2013] 1 LNS 320 CA ***(refd)***
PP v. Tan Gong Wai & Anor [1984] 1 LNS 137 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 316
Penal Code, ss. 354, 377B

For the appellant - Noordin Hussin; M/s Tia & Noordin
For the respondent - Nur Iffa Zarilla Abd Rahman; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] The appellant was charged at the Kota Tinggi Sessions Court for the following charges:

First Charge

Bahawa kamu pada 1.7.2013 diantara jam lebih kurang 10.00 pagi hingga 11.00 pagi di dalam sebuah tandas, di Sekolah Menengah Kebangsaan Dato' Usman Awang di dalam daerah Kota Tinggi di dalam Negeri Johor Takzim, didapati telah melakukan kekerasan jenayah kepada seorang perempuan bernama N.I.H. KPT: XXX dengan niat untuk mencabul kehormatannya dan oleh yang demikian, kamu telah melakukan kesalahan yang boleh dihukum dibawah seksyen 354 Kanun Keseksaan.

Second Charge

Bahawa kamu pada 1.7.2013 diantara jam lebih kurang 10.00 pagi hingga 11.00 pagi di dalam sebuah tandas, di Sekolah Menengah Kebangsaan Dato' Usman Awang di dalam daerah Kota Tinggi di dalam Negeri Johor Takzim, dengan sengaja telah melakukan persetubuhan yang bertentangan dengan luar tabii iaitu dengan memasukan zakar kamu dalam mulut seorang perempuan bernama N.I.H. KPT: XXX dengan niat untuk mencabul kehormatannya dan oleh yang demikian, kamu telah melakukan kesalahan yang boleh dihukum dibawah seksyen 377B Kanun Keseksaan.

[2] The Sessions Court, at the conclusion of the case for the prosecution, ruled that the prosecution had failed to make out a *prima facie* case against the appellant and acquitted and discharged him.

[3] The prosecution filed an appeal against the said decision to the High Court. The High Court upheld the decision of the Sessions Court in acquitting and discharging the appellant on the grounds that the prosecution had failed to make out a *prima facie* case against the appellant.

[4] The prosecution being still aggrieved by the decision to acquit and discharge the appellant, filed a further appeal to the Court of Appeal. The Court of Appeal allowed the appeal by the prosecution and ruled that the prosecution had successfully made out a *prima facie* case against the appellant and ordered the case to be remitted back to the Sessions Court with an order that the defence of the appellant be called.

[5] The Sessions Court accordingly called for the defence of the appellant and found at the end of the whole case that the appellant had failed to raise a reasonable doubt in the prosecution case and convicted him on both charges. The appellant was sentenced to imprisonment of three years from the date of conviction for the first charge under s. 354 of the Penal Code and seven years from date of conviction for the second charge under s. 377B of the Penal Code. Both sentences were ordered to run concurrently. The appellant was not made subject to whipping as he was almost 60 years of age.

[6] The appellant appealed to this court in respect of both the conviction and sentence passed on both charges against him.

Salient Facts

[7] The salient facts led by the prosecution disclosed that on 1 July 2013 between the hours of 10am to 11am while at the classroom at Sekolah Menengah Kebangsaan Dato' Usman, Kota Tinggi, SP1, the victim, was told by the appellant that he would wait for her at the school toilet at the far end.

[8] When SP1 arrived there, the appellant asked SP1 to enter the toilet. The appellant then lifted SP1's dress, groped and fondled her breasts. The appellant then opened his trousers and inserted his penis into SP1's vagina. The appellant also asked SP1 to perform oral sex on him until he ejaculated his semen on the floor. While this act of oral sex was being performed, SP1 was seated on the toilet seat while the appellant was standing.

[9] This incident lasted about 10 minutes. SP1 said that she was unable to escape or to shout for help as she was prevented from doing so by the appellant. SP1 said that she had been violated by the appellant for the last one and a half years previously, the last of the incidents being on 1 July 2013 as per the charges in this case. SP1 said that she and the appellant would usually communicate through short messaging service (SMS) during and after school hours. The appellant had informed SP1 not to tell anyone and to erase all SMSs that she received from him.

[10] SP1 would usually delete the SMS's received from the appellant but on this occasion had forgotten to delete one of the messages. As a result, these SMSs were read by SP1's younger brother who showed the messages to their mother on 3 July 2013. Part of the message was the abbreviated word "hsp".

[11] When confronted by her mother was to what this meant, SP1 replied that it meant "hisap". SP2, the father of SP1 also read the message. SP2 remembered having read the text, "jangan rapat sangat dengan saya, ada yang perasaan" and "esok sayang hisap sampai habis". SP2 asked SP1 about the meaning of the said text but did not get a reply from SP1.

[12] On 4 July 2013, SP2 went to SP1's school and met SP4 who was the "Guru Penolong Kanan Pendidikan Khas" at the SMK Datuk Usman Awang, Kota Tinggi. SP2 inquired as to the number which appeared in SP1's handphone bearing the number 019-7395303 and was told by SP4 that the said handphone number belonged to the appellant. The investigating officer later confirmed that his investigation revealed that the number 019-7395303 was registered in the name of the appellant.

[13] In the absence of SP2, SP4 asked SP1 whether the sender of the SMS was from the hand phone number of the appellant and SP1 nodded her head. SP4 also asked SP1 what the expression "hsp" meant and SP1 replied it meant to perform fellatio or oral sex on the appellant.

[14] On 5 July 2013, SP2 lodged a police report (P6) against the appellant in respect of what the appellant had done to SP1. Following this, SP1 was sent for a medical check-up at the Hospital Sultan Ismail, Johor Bahru, and the medical report tendered as exh. P23.

[15] The said medical report (P23) stated that there was an old hymen tear on the hymen of SP1 at the 3, 6 and 9 o'clock positions.

[16] SP4 under cross-examination, agreed to the suggestion that SP1 was a problem student. SP4 also said that pupils were not allowed to leave the classroom without permission and if such an incident as that as alleged had occurred, it would have been noticed by someone as the door to the toilet was open. SP4 also agreed to the suggestion by learned counsel for the appellant that the allegation by SP1 may have been a mere figment of imagination by SP1.

[17] After defence was directed to be called by the Court of Appeal, the Sessions Court duly ordered for the appellant to make his defence. After the options were explained, the appellant elected to make a statement from the dock. The appellant also called other witnesses in his defence who gave sworn testimony.

[18] The appellant in his unsworn statement, in summary, stated that on 1 July 2013 between 10.10am and 10.40am he was acting as the relief teacher "guru relief" in a "Kelas Iman" or moral class where SP1 was in attendance along with other pupils.

[19] According to the appellant, during that period of time, he did not leave the class. He also said that SP1 also did not leave the class for that duration and should SP1 have wanted to leave the class, she would have to be accompanied by the "penolong pengurusan murid" or the teacher in charge of student affairs.

[20] The appellant stated that SP1 was prone to making up stories and that she had made up this story against him. He denied the allegation. He said that he was the victim of a frame-up.

[21] In support of his evidence, the appellant called SD3 and SD4 as witnesses. SD4 taught the moral class or "Kelas Iman" from 9.40am, until 10.10am, while SD3 taught the same class from 10.40am, until 11.40am. Both these witnesses testified that they had seen the appellant in his moral class or "Kelas Iman" between 10.10am until 10.40am that day.

[22] After hearing the defence, the learned Sessions Court Judge found that the defence had failed to raise a reasonable doubt in the case for the prosecution and convicted him on both charges.

Issues Raised By The Appellant

[23] In summary, the appellant submitted that the learned Sessions Court Judge (SCJ) had failed to evaluate and consider that the evidence of the alleged victim, SP1, was untrue, inconsistent and unsupported by independent corroboration.

[24] The appellant further submitted that the SCJ had confirmed at the close of the prosecution case that the evidence of SP2 and SP3, the father and mother respectively of SP1, was not independent and could not be considered as corroboration as they emanated from the same source, namely, the victim, SP1.

[25] It was contended that the SCJ had misdirected herself when she stated in her grounds of judgment that no alibi notice was given whereas SP7 had confirmed that he had recorded statements from alibi witnesses.

[26] The appellant also submitted that the SCJ had erred in law and fact when she alluded to the fact that the learned High Court Judge had found that a *prima facie* case had been made out whereas in fact, the learned High Court Judge had found that there was no *prima facie* case. The appellant submitted

that the SCJ had erred when she held that the issue of the appellant's impotency "mati pucuk" was an afterthought when in fact it was agreed by SP7 that he had performed a potency test on the appellant.

[27] It was also contended that the SCJ had failed to consider the fact that SP1 was a problem pupil and that her version may have been an invention. It was submitted in conclusion that the evidence against the appellant was weak, the evidence of SP1 was not credible and there was no independent corroboration.

Principles Regarding Appellate Interference

[28] The duty upon a court hearing an appeal from a subordinate court is set out in s. 316 of the Criminal Procedure Code and reads:

> 316. Decision on appeal
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
>
> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence:
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or
>
> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;
>
> (c) in an appeal from any other order, alter or reverse such order.

[29] In the case of *Periasamy Sinnappan & Anor v. Public Prosecutor* [1996] 3 CLJ 187; [1996] 2 MLJ 557, Gopal Sri Ram JCA, (as His Lordship then was) had this to say:

> In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.
>
> In *Lim Kheak Teong v. PP* [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ, Malaya) said (at pp 39-40):
>
> > ... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v. King-Emperor* AIR 1934 PC 227 and secondly purporting to follow Terrell Ag CJ in *R v. Low Toh Cheng* [1941] MLJ 1, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.

A With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that although no limitations should be placed on the power of the appellate court, in exercising the power conferred *'the High Court should and will always give proper weight and consideration to such matters' as:*

B *(1) the views of the trial judge on the credibility of the witnesses;*

(2) the presumption of innocence in favour of the accused;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

C Lord Reid reiterated this same principle in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt(or Thomas) v. Thomas* [1947] 1 All ER 582 that:

D *Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.*

E The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v. Thomas*). On the facts of this case we do not think so. (emphasis added)

F **[30]** The principles that operate to justify a court hearing an appeal interfering with the decision of the trial court has also been set out in the case of *P'ng Hun Sun v. Dato' Yip Yee Foo* [2013] 1 LNS 320; [2013] 6 MLJ 523, where the Court of Appeal held:

G *When the finding of the trial judge is factual, however the fact finder's decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong* (see *China Airline Ltd v. Maltran Air Corp. Sdn Bhd & Anor Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zahara bt. A. Kadir v. China Airline Ltd v. Maltran Air Corp. Sdn Bhd & Anor Appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zahara bt. A. Kadir v. Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015; *Kyros International Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1.

H *The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:*

a) By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or

I *b) In assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or*

c) It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or

d) In so far aside the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer. (emphasis added)

Analysis And Decision

[31] As alluded to earlier, this was a case which was remitted back to the Sessions Court after a finding was made, upon perusing the evidence for the prosecution, that they had succeeded in making out a *prima facie* case against the appellant. This was contrary to the decision of the SCJ and the learned High Court Judge who heard the prosecution's appeal.

[32] It is therefore to be taken that the prosecution had successfully proven the ingredients of the charges against the appellant. The SCJ, after hearing the case for the defence, held that the appellant had failed to raise a reasonable doubt and convicted him on both charges.

[33] It now falls upon this court to examine whether the learned SCJ had erred in law or fact in coming to the findings and decision that she did. This court in doing so was guided by the principles enunciated in the case law in respect of appellate interference as referred to above.

[34] Learned counsel for the appellant submitted *inter alia* that the evidence of SP1, the victim, was not corroborated by the testimony of SP2 and SP3, the father and mother of SP1 respectively, as they emanated from the same source and was therefore not independent. The appellant also submitted that the learned SCJ had recognised this at the close of the case for the prosecution. Learned counsel for the appellant also raised other alleged infirmities in the prosecution case.

[35] As alluded to earlier, the Court of Appeal had ruled, contrary to the decision of the SCJ, that there was a *prima facie* case against the appellant, when it remitted the case back to the Sessions Court with an order that the defence of the appellant be called. In that context, the earlier ruling of the SCJ in respect of the fact that there was no independent corroboration was irrelevant. The same would also go for the other initial findings made by the SCJ at the end of the prosecution case.

[36] There were no grounds made available in respect of the Court of Appeal's decision that the prosecution had successfully made out a *prima facie* case and ruled that the defence be called. However, it is evident that the Court of Appeal must have been satisfied on the available evidence that the prosecution had proven all the necessary ingredients of the charges against the appellant.

Can This Court Revisit The Case For The Prosecution?

[37] The issue arises presently as to whether this court can now re-evaluate the evidence for the prosecution notwithstanding that the Court of Appeal had ruled that there was a *prima facie* case made out? If the answer to the question is in the negative, this court may only then consider whether the SCJ was correct in finding that the defence case had failed to raise a reasonable doubt in the prosecution case. Put another way, this court can then only consider the case for the defence.

[38] The criminal appellate jurisdiction of the superior courts is contained in the following sections of the Courts of Judicature Act 1964.

[39] The criminal appellate jurisdiction of the High Court is as follows:

> 26. Appellate criminal jurisdiction
>
> The appellate criminal jurisdiction of the High Court shall consist of the hearing of appeals from subordinate courts according to any law for the time being in force within the territorial jurisdiction of the High Court.

[40] The criminal appellate jurisdiction of the Court of Appeal is as follows:

> Appellate Jurisdiction – Criminal Appeals
>
> 50. Jurisdiction to hear and determine criminal appeals
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
>
> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.
>
> (2A) An application for leave under subsection (2) shall be made within fourteen days after the date of the decision of the High Court.
>
> (3) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any other officer authorised by the Public Prosecutor; and notwithstanding subsection (2) no leave of the Court of Appeal is required.
>
> (4) Except as otherwise provided in this section, an appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

[41] The criminal appellate jurisdiction of the Federal Court is as follows:

> 87. Jurisdiction to hear and determine criminal appeals
>
> (1) The Federal Court shall have jurisdiction to hear and determine any appeal from any decision of the Court of Appeal in its appellate jurisdiction in respect of any criminal matter decided by the High Court in its original jurisdiction subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal.
>
> (2) Notice of any appeal by the Public Prosecutor shall be signed by the Public Prosecutor, the Solicitor General or any officer authorised by the Public Prosecutor.
>
> (3) An appeal may lie on a question of fact or a question of law or on a question of mixed fact and law.

[42] It is clear from the above that the hierarchy or structure of the system of courts in our jurisdiction was essentially premised upon a two-tier right of appeal. Cases from the Magistrate's Courts may thus be appealed to the High Court and thereafter on a point of law, with leave, to the Court of Appeal.

[43] Cases from the Sessions Court may be appealed to the High Court and thereafter to the Court of Appeal while cases tried by the High Court in their original jurisdiction, may be appealed to the Court of Appeal and to the Federal Court.

[44] The decision of the SCJ that the prosecution had failed to make out a *prima facie* case for the prosecution was subject to appeal to the High Court who upheld the decision of the SCJ. The matter thereafter went on further appeal to the Court of Appeal. However, the Court of Appeal to the contrary decided that the prosecution had succeeded in making out a *prima facie* case and ordered that the defence of the appellant be called. That effectively concluded the two-tier process in respect of the decision in respect of whether a *prima facie* case had been made out by the prosecution.

[45] To now allow the appellant to revisit the issue of whether a *prima facie* case had been made out would tantamount to according to the appellant "three bites at the cherry", to quote an analogous proverb. The two-tier hierarchy system and also the principle of *stare decisis* would militate against this.

[46] I therefore hold that this court is bound by the decision and finding of the Court of Appeal that a *prima facie* case was made out by the prosecution. It cannot re-visit the case for the prosecution. This court is therefore only confined to considering whether the defence case has succeeded in raising a reasonable doubt in the case for the prosecution.

Had The Learned Sessions Court Judge (SCJ) Erred In Law Or Fact In Her Assessment Of The Defence?

[47] The learned SCJ after hearing and assessing the defence and in keeping with established principles as to assessment of evidence at the end of the whole case, had re-evaluated all the evidence and exhibits in coming to her

finding that the prosecution had succeeded in proving a case against the appellant beyond a reasonable doubt. This was clearly reflected in the learned SCJ's grounds of judgment.

[48] The learned SCJ had further considered the effect of the appellant's sworn statement from the dock. She had placed reliance upon the case of *Masroni Ahmad Rafi v. Public Prosecutor* [1996] 1 LNS 341 which held:

> The Appellant gave a statement from the dock. The right of an accused ... to make an unsworn statement from the dock is not a procedural right but a substantive right: *Mohamed Salleh v. PP* [1969] 1 MLJ 104 @ 105 per Wee Chong Jin CJ; see also *Udayar Alagan & Ors v. PP* [1962] 28 MLJ 39. *An accused who makes a statement from the dock should not be questioned by the trial judge except for the purpose of clearing up ambiguities (Suhaime bin Haji Serat v. Req [1956] 22 MLJ 252). However, the weight to be given to a statement from the dock, since such a statement is not sworn evidence and would not have been tested by cross-examination, must be less than it being evidence from the witness box* (see *Mohamed Salleh v. PP* [1969] 1 MLJ 104 @ 105). *"... it is not entitled to the same[10] weight as sworn testimony"*: *PP v. Karim bin Othman* (1994) 2 CLJ 826 @ 836 per Lamin J (as he then was); see also *Shimmin*'s Case 15 Cox C.C. 122 @ 124. As to the particular evidential value to be given to an unsworn statement from the dock, "much depends on the particular circumstances of each case": *Director of Public Prosecutions v. Walker* (1974) 1 WLR per Lord Salmon. And in *PP v. Lee Ah Ha* [1989] 1 MLJ 120, where the prosecution had made out a case, Abdul Malek J (as he then was) held that a mere denial through a statement from the dock had not raised any doubt on the prosecution case. (emphasis added)

[49] The learned SCJ had therefore correctly observed that the weight to be accorded to an unsworn statement made from the dock must necessarily be entitled to less weight than that of evidence by way of sworn testimony.

[50] She had further correctly observed that the evidential value of such evidence would be affected by the absence of the opportunity to test the credibility of such evidence by way of cross-examination. She was therefore correct also in observing that the appellant had failed to give credible evidence.

[51] Although SD3 and SD4 had respectively testified that they had taught a class each after and before the class taught by the appellant, and each of them had witnessed the appellant in the classroom that day, they could not be certain that both the appellant and SP1 were in fact present in the class during the whole time. The learned SCJ had correctly considered this part of the evidence as reflected in her judgment when she observed that these witnesses could not support the appellant's alibi.

[52] The submission of learned counsel for the appellant that the learned SCJ had erred when in her grounds of judgment she stated that no alibi notice was given was unfounded. Notwithstanding such reference by the learned SCJ, she had in her grounds of judgment alluded to the testimonies of the defence witnesses that did not support the appellant's alibi. The learned SCJ was therefore cognizant of and well aware of the fact that the appellant's defence was premised upon an alibi.

[53] The appellant had not denied sending the SMS to SP1. He, however, said that it was only meant to be a joke. The appellant's contention that the family of the victim was unhappy with him and conspired against him merely based upon his SMS was not reasonable. SP1's and SP2's evidence that the appellant had committed the acts complained of were therefore credible and demolished the claim of the appellant that they had conspired against him.

[54] The learned SCJ had correctly found that the defence of him being impotent or "mati pucuk", was unsupported by any credible evidence sufficient to raise a reasonable doubt in the prosecution case. While the court may not draw any adverse inference against defence for the non-calling of a witness, a court may take into account failure to call a witness by the defence. See *Public Prosecutor v. Tan Gong Wai & Anor* [1984] 1 LNS 137; [1985] 1 MLJ 355, which held as follows:

> *I realise that no adverse inference against an accused person may be drawn by reason of his failure to call any witness* or indeed to even give evidence on his own behalf for all he has to do is to raise a reasonable doubt: (*Goh Ah Yew v. Public Prosecutor* [1949] MLJ 150. *However, the failure to call any particular witness is a matter which the Court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence* (*Regina v. Gallagher* [1974] 1 WLR 1204; *Public Prosecutor v. Lira Kuan Hock* [1967] 2 MLJ 114, 115; *Tay Choo Wah v. Public Prosecutor* [1976] 2 MLJ 95, 100. (emphasis added)

[55] The learned SCJ's erroneous reference to the fact that the learned High Court Judge had found that the prosecution had made out a *prima facie* case against the appellant did not prejudice the appellant's case. As earlier considered, this court was not at liberty to revisit the decision of the Court of Appeal in respect of whether the prosecution had successfully made out a *prima facie* case against the appellant. That being the case, the remark made by the learned SCJ held no present consequence and therefore did not prejudice the appellant in any manner.

[56] The incorrect description of the defence of the appellant that he was impotent, as an afterthought, did not prejudice the case for the prosecution as there was sufficient evidence that the appellant had committed the offence. In any event, even if the appellant was impotent, this did not necessarily mean that he did not commit the offences for which he was charged with. There was sufficient other evidence that the appellant had committed the offences he was charged for.

[57] On a consideration of the evidence as a whole, I do not find that the learned SCJ had erred in fact or in law in coming to her ultimate decision at the end of the whole case. The appeal against conviction is therefore dismissed.

A **Sentence**

[58] In respect of sentence, upon a perusal of the grounds of judgment of the learned Sessions Court Judge, she had considered all relevant factors. She had considered that the public interest was the first and foremost consideration and that not only must the sentence passed act as a lesson to
B the offender but also act as a deterrent to others in wanting to commit such offences.

[59] The learned SCJ had further correctly recognised the vulnerability of the victim who was a child with special needs and that the appellant had abused the trust and confidence reposed in him to care for the victim as
C custodian and not to take advantage of the situation. The learned SCJ had also alluded to the fact that the appellant had tainted the good name of the teaching profession by committing such an act. She had therefore taken into account all relevant considerations.

D **[60]** Under the circumstances, I found no flaw in the sentences passed by the learned SCJ and accordingly dismissed the appeal against sentence while affirming the sentences passed by the SCJ.

E

F

G

H

I